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No. 10-551

IN THE

Supreme Court of the United States

KEITH LITMAN, ET AL,

Cross-Petitioners,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA") requires the enforcement of a drafting party's express agreement not to arbitrate but to litigate in court if the class action ban in the arbitration agreement is unenforceable, where that party incorporates state law under its choice-of-law provision that contractual class action bans are unenforceable.

PARTIES TO THE PROCEEDING

Cross-Petitioners are Keith Litman and Robert Wachtel ("Cross-Petitioners").

Cross-Respondent is Cellco Partnership d/b/a Verizon Wireless ("Cross-Respondent"). Cross-Respondent's required Rule 29.6 Statement is included at page ii of its petition for a writ of certiorari.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioners Keith Litman and Robert Wachtel respectfully submit this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit reversing the trial court's decision granting Cross-Respondent's petition to compel arbitration is unreported but is available at 2010 WL 2017665, and is reprinted in the Appendix of Cross-Respondent's petition for a writ of certiorari ("App.") at 1a-7a. The trial court's decision granting Cross-Respondent's petition to compel arbitration is unreported but is available at 2008 WL 4507573, and is reprinted at App. 8a-28a.

JURISDICTION

The United States Court of Appeals for the Third Circuit rendered its decision on May 21, 2010. App. 1a. This Court granted Cross-Respondent's application for an extension of time to file a petition for a writ of certiorari, and extended the time to and including September 20, 2010. Order, Application No. 10A129 (July 30, 2010). Cross-Petitioners are expressly relying on Rule 12.5 in filing their cross-petition. Cross-Respondent's petition for a writ of certiorari was filed with the Court on September 20, 2010, and placed on the docket on September 22, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

A necessary predicate to the right to compel arbitration on an individual basis is the "right [to arbitrate] in the first place." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 498 U.S. 468, 474-75 (1989).

The Court has already granted certiorari in *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-893), on the issue whether the FAA preempts state contract law providing that a class action ban in an arbitration agreement can be unconscionable and unenforceable. This cross-petition presents an issue precedent to that issue: Whether a drafting party, who expressly agrees not to arbitrate but to litigate in court if the class action ban in the arbitration agreement is unenforceable, should be bound by that agreement under the FAA where that party incorporates state law

under its choice-of-law provision that contractual class action bans are unenforceable.

Many of the consumer contracts with arbitration agreements that could be affected by this Court's ruling in *Concepcion*, including Cross-Respondent's contract here, currently employ the same general structure by the corporate drafter: (i) a class action ban embedded within the arbitration agreement; (ii) a choice-of-law provision incorporating existing state law that class action bans in small value consumer contracts are unenforceable; and (iii) an express agreement not to arbitrate but to litigate in court if the class action ban is unenforceable. Joint Appendix on Appeal, Vol. II, at A54-A55, A-71-72. Petitioner in *Concepcion* employs the same structure. AT&T Mobility LLC Petition for a Writ of Certiorari, Appendix C, at 57a, 58a, 61a; District Court Docket, *Laster, et al v. T-Mobile USA Inc., et al.*, No. 05-CV-1167 (S.D. Cal.), Docket Entry # 128-1, at page 21 of 22 (choice of law provision).

The Court has "said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010), *citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 498 U.S. 468, 479 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

This case, and the question presented by Cross-Petitioners, squarely provides the Court with an

opportunity to clarify the intersection of *Volt*, *Mastrubuono* and *Stolt-Nielsen* when the drafting party expressly agrees not to proceed in the arbitral forum but instead to litigate if the applicable law under the choice-of-law provision regarding the class action ban favors the non-drafting parties, *viz.*, the drafting party's customers.

The Court's grant of certiorari in *Concepcion*, and the twenty-seven merits and amicus briefs filed to date in that case, demonstrate that the issue of whether the FAA preempts state contract law providing that class action bans in arbitration agreements can be unconscionable and unenforceable is an important and recurring issue of federal law. Cross-Respondent's petition for a writ of certiorari acknowledges that *Concepcion* and this case are substantially factually identical. Petition at 3, 11. Cross-Respondent's wireless telephone lines at the time Cross-Petitioners' action was commenced exceeded 60 million, and thus the number of arbitration agreements affected solely in this case is in the tens of millions. The number of affected contracts expands exponentially when the similar customer contract at issue in *Concepcion*, and in all of the other pending consumer class actions asserting different claims against Cross-Respondent, the *Concepcion* petitioner, and other wireless service providers and consumer-oriented businesses are included.

Cross-Petitioners respectfully submit that the application of the Court's FAA decisions to the facts of this case can lead to only one conclusion, regardless of the outcome of *Concepcion* – Cross-Respondent is bound under the FAA by its agreement not to arbitrate

but to litigate when, as here, the incorporated state law favors its customers and precludes the enforceability of its contractual class action ban. A conclusion to the contrary would render Cross-Respondent's agreement to litigate rather than arbitrate and its choice-of-law provision a nullity, contrary to the "central purpose" of the FAA and the application of cardinal principles of contract law.

A grant of certiorari on the question presented by Cross-Petitioners is warranted here to allow the Court to address the proper application of the FAA in a comprehensive manner this term. The issues presented in *Concepcion* and by Cross-Petitioners here are tightly intertwined, and the failure by the Court to consider them together could result in the issuance of a ruling in *Concepcion*, and the potential application of that ruling in this case, that are inconsistent with the express terms of the arbitration agreements under consideration. Granting certiorari will ensure consistency between the Court's ruling in *Concepcion* and the arbitration agreement on which it is based, and promote harmony between that ruling and the rights and obligations of the parties to arbitration agreements incorporating the terms widely employed by Cross-Respondent, the *Concepcion* petitioner, and many other drafting parties.

1. Cross-Petitioners' Claims.

Cross-Petitioners assert claims against Cross-Respondent for breach of contract and violations of the New Jersey's Consumer Fraud Act, N.J.S.A. § 56:8-1, *et seq.*, based on Cross-Respondent's imposition of a newly-minted, per-line "administrative charge"

("Administrative Charge") beginning in October, 2005. Compl. ¶¶ 1-4 (Joint Appendix on Appeal, Vol. II, at A26-A28). When first implemented in October 2005, the Administrative Charge was $0.40 per line, and was imposed on approximately 50 million lines, generating new revenues for Cross-Respondent of approximately $20,000,000 monthly. *Id.* In March, 2007, the Administrative Charge was increased by 75%, to $0.70 per line, and was imposed on some 60 million lines, generating revenues of approximately $42,000,000 monthly and $500,000,000 annually. *Id.*

Cross-Petitioners allege that the Administrative Charge is a discretionary, improper pass-through of Cross-Respondent's general overhead costs wholly unrelated to specific lines, and was implemented by Cross-Respondent to effect a concealed increase in the agreed-upon monthly rates for service. *Id.* For example, the November 2006 Customer Agreement first expressly referencing the Administrative Charge stated that Cross-Respondent's billed charges would "include Federal Universal Service, Regulatory and Administrative Charges, and may also include other charges related to our governmental costs." Joint Appendix on Appeal, Vol. II, at A52. The Customer Information Overview accompanying Cross-Respondent's November 2006 Customer Agreement described the Administrative Charge as a charge "to recover or help defray costs of taxes and of governmental surcharges and fees imposed on us, and costs associated with governmental regulations and mandates on our business." *Id.* at A50. However, in the District Court proceedings, Cross-Respondent admitted on brief that it was using the Administrative Charge to

"recove[r] general costs it incurred to provide service," including "the costs of building new cell sites." District Court Docket, *Litman, et al v. Cellco P'shp d/b/a Verizon Wireless*, No. 07-CV-4886 (D.N.J.), Docket Entry # 9-2, at pp. 28-29. By contrast, a federal district court judge analyzing the same uniform contract and disclosure documents provided to Cross-Respondent's customers concluded, without qualification, that the Administrative Charge was supposed to be a recovery of "governmental-surcharge-related costs." *See Smale v. Cellco P'shp*, 547 F. Supp. 2d 1181, 1186 (W.D. Wash. 2008).

2. The Parties' Arbitration Agreement.

The arbitration agreement between Cross-Respondent and Cross-Petitioners and all of Cross-Respondent's other customers, effective in and after November 2006 and when the action was commenced in October 2007, provided in pertinent part as follows (Joint Appendix on Appeal, Vol. II, at A54-A55, A71-A72):

> WE EACH AGREE TO SETTLE DISPUTES . . . ONLY BY ARBITRATION.
>
> * * *
>
> (1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. . . . ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR ANY PRIOR AGREEMENT FOR WIRELESS SERVICE WITH US . . . WILL BE SETTLED BY [ARBITRATION].

* * *

> (3) . . . THIS AGREEMENT DOESN'T PERMIT CLASS ARBITRATIONS EVEN IF TH[E] PROCEDURES [OF THE AMERICAN ARBITRATION ASSOCIATION OR BETTER BUSINESS BUREAU] WOULD.

* * *

> (6) IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION 3 ABOVE IS DEEMED UNENFORCEABLE, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY. FURTHER, IF FOR ANY REASON A CLAIM PROCEEDS IN COURT RATHER THAN THROUGH ARBITRATION, WE EACH WAIVE ANY TRIAL BY JURY.

The Customer Agreement also includes the following choice-of-law provision (Joint Appendix on Appeal, Vol. II, at A55, A72):

> Except to the extent we've agreed otherwise in the provisions on late fees, collection costs and arbitration, or as required by Federal law, this agreement and disputes covered by it are governed by the laws of the state encompassing the area code assigned to your wireless phone number when you accepted

> this agreement, without regard to the conflicts of laws rules of that state.

3. The Incorporated New Jersey Law, And Cross-Respondent's Concession Of Its Applicability.

Cross-Respondent's principal offices are in New Jersey, and Cross-Petitioners' wireless phone numbers both have New Jersey area codes. Compl. ¶¶ 7, 11 (Joint Appendix on Appeal, Vol. II, at A29, A30). Under the choice-of-law provision quoted immediately above, New Jersey law governs.

Cross-Respondent's petition for a writ of certiorari based on FAA preemption principally challenges the decision of the New Jersey Supreme Court in *Muhammad v. County Bank of Rehoboth Beach, Del.*, 189 N.J. 1 (N.J. 2006) ("*Muhammad*"). In *Muhammad*, the New Jersey Supreme Court found that class waivers "can act effectively as an exculpatory clause" – and thus may be "void as against public policy" under New Jersey law, 189 N.J. at 19-20, and held:

> Applying the controlling test for determining unconscionability for contracts of adhesion . . . , we hold that the class-arbitration waiver in this consumer contract is unenforceable. Such a waiver would be unconscionable whether applied in a lawsuit or in arbitration. 189 N.J. at 7.
>
> As a matter of generally applicable state contract law, it was unconscionable for defendants to deprive Muhammad of the

> mechanism of a class-wide action, whether in arbitration or in court litigation. 189 N.J. at 22.

Further concluding "that the appropriate remedy in these circumstances is to sever the unconscionable provision and enforce the otherwise valid arbitration agreement," *id.* at 6, the *Muhammad* Court remanded the case for entry of an order compelling arbitration. *Id.* at 26-27.

In a companion decision issued the same day, the New Jersey Supreme Court applied the same standards as in *Muhammad* to facts involving a high value claim and held that the class waiver was not unconscionable; it required the companion case to be arbitrated as well. *See Delta Funding Corp. v. Harris*, 189 N.J. 28, 46-47 (N.J. 2006).

Muhammad and *Delta Funding* were both issued on August 9, 2006 and, thus, were the controlling law of New Jersey regarding the enforceability of contractual class action bans when Cross-Respondent's revised customer agreement took effect in November 2006. Joint Appendix on Appeal, Vol. II, at A45-A46 (Malutich Certification), ¶ 6; A51-A55 (November 2006 Customer Agreement).

Thus, in the District Court, Cross-Respondent conceded that *Muhammad* applies to its arbitration agreement with Cross-Petitioners, although it contended that whether *Muhammad* "controls" depends solely on resolution of the FAA preemption issue (Joint Appendix on Appeal, Vol. II, at A78):

> Verizon does not challenge, for purposes of this [Petition], that the New Jersey Supreme Court's decision in *Muhammad* applies to Verizon's arbitration agreement. Moreover, Verizon is in agreement with Plaintiffs that, if *Muhammad* controls, Plaintiffs are entitled to proceed with this lawsuit. To resolve this dispute, this Court therefore must determine whether *Muhammad* is preempted under the FAA.

4. Cross-Petitioners' Assertion Of Their Right To Enforce The Terms Of The Arbitration Agreement.

In the section of their Complaint entitled "THIS CASE IS NOT SUBJECT TO ARBITRATION," Cross-Respondents alleged at ¶ 11:

> 11. In light of the location of Defendant's principal offices in New Jersey and/or the New Jersey area codes for Plaintiffs' wireless lines, New Jersey law controls the unconscionability and unenforceability of the class action preclusion clause in the arbitration provisions of Defendant's customer agreement. The New Jersey Supreme Court, in *Muhammad v. County Bank of Rehoboth Beach, Del.*, 189 N.J. 1, 912 A.2d 88 (N.J. 2006), squarely held that class action preclusion clauses like that engrafted by Verizon Wireless onto the standard customer agreement are unconscionable and unenforceable; this New Jersey law governs here.

5. Cross-Petitioners Draw In Question In The Proceedings Below The Question Presented In Their Cross-Petition.

In their brief in opposition to Cross-Respondent's motion to compel arbitration in the District Court, Cross-Petitioners argued as an initial matter that the Court's decision in *Volt* required Cross-Respondent to be bound by its agreement not to arbitrate but to litigate in court because the class action ban was unenforceable under the incorporated law of New Jersey. District Court Docket, *Litman, et al v. Cellco P'shp d/b/a Verizon Wireless*, No. 07-CV-4886 (D.N.J.), Docket Entry # 17, at pp. 4, 9-15. The argument also was Cross-Petitioners' initial argument in their opening brief in the Court of Appeals. Court of Appeals Docket, *Litman, et al v. Cellco P'shp d/b/a Verizon Wireless*, Appeal No. 08-4103 (3d Cir.), Appellants' Brief filed January 7, 2009, at pp. 2, 28-32. The argument was reiterated in Cross-Petitioners' reply brief. Court of Appeals Docket, Appellants' Reply Brief filed March 9, 2009, at pp. 21-24. And the same issue also was argued by Cross-Petitioners during oral argument in the Third Circuit on November 5, 2009. Court of Appeals Docket, Certified Transcript of November 5, 2009 Oral Argument, filed November 16, 2009, at pp. 14-15.

The issue was not specifically addressed by the Third Circuit or the District Court in their decisions addressing the preemption of New Jersey law under the FAA. App. 1a-7a, App. 8a-28a. Nevertheless, the question presented by Cross-Petitioners has consistently been drawn in question, and thus may properly be considered by the Court. *Southland Corp. v. Keating*, 465 U.S. 1, 8-9 (1984).

REASONS FOR GRANTING THE CROSS-PETITION

I. The Court's Grant of Certiorari In *Concepcion*, Cross-Respondent's Petition Here, And The Complete Interrelatedness Of The Issues Presented There And In This Cross-Petition, Demonstrate That This Case Satisfies The Rule 10 Standard For Granting Certiorari.

The importance of the question whether the FAA preempts state contract law providing that a class action ban in an arbitration agreement may be unconscionable and unenforceable is indisputable and meets the Rule 10 standard, as confirmed by the grant of certiorari in *Concepcion* and as further supported by the filing of Cross-Respondent's petition here based on substantially identical facts (Petition at 3, 11).

This case also warrants the Court's review because Cross-Petitioners advance an issue of great importance under the federal law that potentially undermines the entitlement of Cross-Respondent to the ruling it seeks in its petition, the entitlement of the *Concepcion* petitioner under its arbitration agreement to the ruling the Court has agreed to provide, and the right of many consumer-oriented businesses to insist on the enforcement of the class action bans embedded in the arbitration agreements they have drafted notwithstanding their incorporation of controlling state contract law to the contrary.

Although no court of appeals has yet addressed the issue raised by Cross-Petitioners, the question

presented arguably falls within the literal prescription of Rule 10(c) that "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court," because many federal courts have decided the preemption issue without consideration of all of the terms of the arbitration agreement that are required to be enforced under the FAA and the Court's relevant decisions. Furthermore, the issue presented, at least in this case, is purely one of FAA law, and avoids the constitutional implications of the Supremacy Clause raised in *Concepcion* and Cross-Respondent's petition.

Granting certiorari will ensure consistency between the Court's ruling in *Concepcion* and the arbitration agreement on which it is based and Cross-Respondent's agreement here, and will promote harmony between that ruling and the rights and obligations of the parties to arbitration agreements incorporating the terms widely employed by Cross-Respondent, the *Concepcion* petitioner, and many other drafting parties. Most importantly for Cross-Petitioners personally, granting their Cross-Petition could result in a decision in their favor regardless of the outcome in *Concepcion*, and even notwithstanding a decision in favor of the petitioner there.

II. Review Is Warranted Because The Issue Presented By Cross-Petitioners Directly Affects The Right Of Cross-Respondent Here, And Also Potentially The *Concepcion* Petitioner, To Seek To Enforce The Class Action Ban Under The FAA.

The issue presented by Cross-Petitioners resides at the intersection of three of the Court's decisions interpreting arbitration agreements under the FAA: *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 498 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010).

A. *Volt*

In *Volt*, Stanford University had entered into a construction contract, containing an arbitration provision, under which Volt was to install a system of electrical conduits on the Stanford campus. 489 U.S. at 470. The contract also contained a choice-of-law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located." *Id.* After a dispute developed regarding compensation for extra work, Volt made a formal demand for arbitration, and Stanford responded by filing an action against Volt in California Superior Court, alleging fraud and breach of contract; in the same action, Stanford also sought indemnity from two other companies involved in the construction project with whom it did not have arbitration agreements. *Id.*, at 470-71. Volt petitioned the California Superior Court to compel arbitration of

the dispute. *Id.*, at 471. Stanford, in turn, moved to stay arbitration pursuant to Cal. Civ. Proc. Code Ann. § 1281.2(c), which permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where "there is a possibility of conflicting rulings on a common issue of law or fact." *Id.* Both California lower courts denied Volt's petition to compel arbitration and granted Stanford's motion to stay arbitration, and the California Supreme Court declined review. *Id.*, at 471-73.

This Court affirmed the decisions of the California state courts, and in so doing, rejected a host of arguments that the FAA is undermined if a case like this one does not proceed in arbitration. First, the Court rejected Volt's suggestion that the California state courts' "construction of the choice-of-law clause was in effect a finding that appellant had 'waived' its 'federally guaranteed right to compel arbitration of the parties' dispute,' a waiver whose validity must be judged by reference to federal rather than state law." *Id.*, at 474. As the Court observed, *id.*, at 474-75:

> [T]he Court of Appeal found that, by incorporating the California [law] into their agreement, the parties had agreed that arbitration would not proceed in situations which fell within the scope of Calif. Code Civ. Proc. Ann. § 1281.2(c) (West 1982). This was not a finding that appellant had "waived" an FAA-guaranteed right to compel arbitration of this dispute, but a finding that *it had no such right in the first place, because the*

> *parties' agreement did not require arbitration to proceed in this situation.* (Emphasis added).

Second, the Court rejected Volt's argument that the state court result "violates the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration," *id.*, at 475-76: "[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."

Finally, the Court rejected Volt's argument that enforcing the state law rules incorporated into the parties' agreement by the choice-of-law clause "would undermine the goals and policies of the FAA" and thus impliedly be preempted. *Id.*, at 476-79. As the Court stated:

> [T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement . . . . It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *Id.*, at 478 (citations omitted) . . . By permitting the courts to "rigorously enforce" such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA. *Id.*, at 479 (citation omitted).

B. *Mastrobuono*

In *Mastrobuono*, spouses Diana and Antonio Mastrobuono entered into an account agreement in connection with their brokerage account at Shearson Lehman Hutton, Inc. which included both an arbitration provision and a choice-of-law provision. 514 U.S. at 54. The Mastrobuonos subsequently asserted claims against Shearson Lehman Hutton and the Shearson executive who managed their brokerage account (collectively "Shearson"), alleging that Shearson had mishandled their account, and claiming damages under a variety of state and federal law theories. *Id.* The claims were originally brought in federal court, but Shearson successfully compelled arbitration under the terms of the arbitration agreement, and a panel of three arbitrators was convened. *Id.*

After conducting hearings in Illinois, the panel ruled in favor of the Mastrobuonos, including an award of punitive damages of $400,000, in addition to compensatory damages of $159,327. *Id.* Shearson paid the compensatory portion of the award but filed a motion in the District Court to vacate the award of punitive damages. *Id.* The District Court granted the motion, and the Court of Appeals for the Seventh Circuit affirmed, both relying on the choice-of-law provision in the parties' arbitration agreement, which specified New York as the governing law. *Id.*, at 54-55. Because the New York Court of Appeals had decided that in New York the power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators, *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976), the District Court and the Seventh Circuit held

that the panel of arbitrators had no power to award punitive damages. *Id.*, at 55. This Court reversed.

With healthy reference, *inter alia*, to *Volt*, the Court confirmed initially "that if contracting parties agree[d] to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Id.*, at 58.

The Court then proceeded to determine what the parties' contract "ha[d] to say about the arbitrability of petitioners' claim for punitive damages." Because the contract terms included no express reference to punitive damages, the Court based its analysis on the interrelationship of the two pertinent terms: (i) the choice-of-law provision providing, in part, that the entire agreement "shall be governed by the laws of the State of New York," and the arbitration provision providing that "any controversy" arising out of the transactions between the parties "shall be settled by arbitration" in accordance with the rules of the National Association of Securities Dealers (NASD), or the Boards of Directors of the New York Stock Exchange and/or the American Stock Exchange. *Id.*, at 58-59. The Court's analysis began by considering each provision separately, before "mov[ing] on to the more important inquiry: the meaning of the two provisions taken together." *Id.*, at 59, *quoting* Restatement (Second) of Contracts § 202(2) (1979) ("A writing is interpreted as a whole").

Analysis of the choice-of-law and arbitration provisions separately led the Court to conclude that

"neither the choice-of-law clause nor the arbitration clause, separately considered, expresses an intent to preclude an award of punitive damages" and, in fact, arguably supported an intent to allow the award of punitive damages. *Id.*, at 60-62. Thus, to resolve the issue, the Court relied on two essentially universal, hornbook, principles of contract law.

First, the Court applied the common-law rule of construction against the drafter in cases of ambiguity:

> [Shearson] cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. . . . [Shearson] drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result. *Id.*, at 62-63 (citations omitted).

To reinforce the propriety of the rule's application, the Court quoted the justification for it as set out in Restatement (Second) of Contracts § 206, Comment *a* (1979):

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure,

> intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. *Id.*, at 63, n.10.

Second, the Court determined that Shearson's argued for interpretation, by rendering the two provisions in conflict with each other, violated "another cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." *Id.*, at 63, *citing, e.g.*, Restatement (Second) of Contracts § 203(a) and Comment *b*; *id.*, § 202(5).

Placing the two provisions in harmony rather than opposition, and construing the agreement against the drafter, the Court upheld the award of punitive damages by the arbitrators. *Id.*, at 64.

C. *Stolt-Nielsen*

Last term, in *Stolt-Nielsen*, the Court addressed the relatively widespread practice that had developed among arbitrators since the Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), of relying solely on the rules of the arbitration forum rather than any applicable substantive law to allow class action arbitrations when confronted with silence on that issue in the arbitration agreement – in *Stolt-Nielsen*, when the parties expressly stipulated that there was "no agreement" on the question. 130 S. Ct. at 1764, 1776. The decision is recent, and its impact on the issue for

which the Court granted certiorari in *Concepcion* is in great contention, as the *passim* references throughout Cross-Respondent's petition confirms.

Although *Stolt-Nielsen* does not involve the interrelationship of a choice-of-law provision with the substantive terms of the arbitration agreement, it represents a concise restatement of basic relevant principles underlying the Court's decisions in *Volt* and *Mastrobuono*, as well as the Court's other FAA jurisprudence. Among these principles, which Cross-Petitioners respectfully submit govern the rights and obligations *both* of the drafter of a consumer-related arbitration agreement and its consumer-customers, are the following:

> (i) The central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms. 130 S. Ct. at 1773.
>
> (ii) Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties, and as with any other contract, the parties' intentions control. 130 S. Ct. at 1774.
>
> (iii) The parties may agree to limit the issues they choose to arbitrate, may agree on rules under which any arbitration will proceed, and may choose who will resolve specific disputes. *Id.*

> (iv) Construction of the arbitration agreement must be predicated on, *inter alia*, pertinent FAA and state law. *Id.*, at 1768-69.

The question presented by Cross-Petitioners here requires the application of the choice-of-law principles squarely addressed in *Volt* and integrated with traditional common-law contract principles in *Mastrobuono* to a case where the undisputed facts are the converse of *Stolt-Nielsen*: rather than silence and "no agreement" regarding class actions, here there is an express agreement regarding the enforceability of the class action ban and the arbitration agreement as a whole, as well as the choice of forum, depending on the applicable law under the drafter's choice-of-law provision. That the question presented is tightly, if not inextricably, intertwined with the issue the Court already has agreed to decide in *Concepcion* is a compelling reason to grant the cross-petition.

D. Under The FAA, And Based On Cross-Respondent's Incorporation Of Controlling New Jersey Law, Cross-Respondent Is Bound By Its Express Agreement Not To Arbitrate But To Litigate.

Cross-Respondent has *conceded* its understanding and intention under the choice-of-law provision — that New Jersey law, and specifically *Muhammad*, applies to its arbitration agreement. *See* Statement, § 3, *supra*, *quoting* Joint Appendix on Appeal, Vol. II, at A78. Cross-Respondent could not suggest otherwise. Indeed, none of the drafting parties who have sought to avoid the application of state contract law rendering the class

action bans unenforceable, including the *Concepcion* petitioner, have disputed the "applicability" of the incorporated law, focusing instead on whether the FAA renders that law not "controlling" and thus insulates them from the state law's reach.

Under the plain terms of its arbitration agreement with Cross-Petitioners (Joint Appendix on Appeal, Vol. II, at A55, A72), Cross-Respondent has agreed with Cross-Petitioners that:

> (6) *IF FOR SOME REASON* THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION 3 ABOVE IS *DEEMED* UNENFORCEABLE, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY. FURTHER, *IF FOR ANY REASON* A CLAIM PROCEEDS IN COURT RATHER THAN THROUGH ARBITRATION, WE EACH WAIVE ANY TRIAL BY JURY. (Emphasis added).

"If for some reason" and "if for any reason" are without qualification or limitation. The term "deemed," which is undefined in the agreement, is defined in the transitive as "to hold as an opinion," and in the intransitive as "to form or have an opinion; judge." The Random House College Dictionary (rev. ed. 1984). Thus, under the plain terms of Cross-Respondent's arbitration agreement and in light of the conceded applicability of *Muhammad*, the class action ban has been "deemed unenforceable" "for some reason" and/or "for any reason."

Cross-Respondent's attempt to avoid the application of New Jersey law and its agreement not to arbitrate but to litigate would render both its choice-of-law provision and its agreement not to arbitrate superfluous and meaningless, and would violate the "cardinal principle of contract construction: that a document should be read to give effect to all of its provisions and to render them consistent with each other." *Mastrobuono*, 514 U.S. at 63. Such a construction and result runs counter to the "central" and "primary" purpose of the FAA, as *Volt*, *Stolt*, *Mastrobuono* and the entirety of the Court's FAA jurisprudence confirm.

Predictably, the construction Cross-Respondent seeks to impose also is precluded under the contract law of New Jersey, as articulated by the New Jersey Supreme Court in, *inter alia*, *Krosnowski v. Krosnowski*, 22 N.J. 376, 387-88 (N.J. 1956):

> A contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing and every word of it, will, if possible, be given effect; the words are to be given a 'reasonable meaning rather than an unreasonable one and a court will endeavor to give a construction most equitable to the parties and which will not give one of them an unfair or unreasonable advantage over the other.' 9 Williston on Contracts (rev. ed. 1945), section 46.

It is indisputable that Cross-Respondent, the *Concepcion* petitioner, and other drafters of arbitration agreements employing similar structures, want and intend the choice-of-law clause to apply – in those states where class action bans are not unconscionable and unenforceable. AT&T Mobility LLC Petition for a Writ of Certiorari, Appendix D, at 63a-69a. These corporate drafters want the choice-of-law provision to apply *only* when it benefits them, and not when it benefits their consumer-customers – "an unfair and unreasonable advantage over the other." *Krosnowski*, 22 N.J. at 388. Furthermore, the "dual" or inconsistent applicability of the same choice-of-law provision implicates the rule of construction against the drafter in cases of ambiguity. Again, predictably, the rule of construction against the drafter also is the law of New Jersey applicable here, as established in *Highland Lakes Country Club & Community Ass'n v. Franzino*, 186 N.J. 99, 122-23 (N.J. 2004) (citations and quotations omitted):

> [W]hen the terms of the [agreement] are susceptible to at least two reasonable alternative interpretations, the language is ambiguous. . . . This Court has recognized that [w]here an ambiguity appears in a written agreement, the writing is to be strictly construed against the draftsman. . . . That principle is especially true where the parties to the contract do not have the same bargaining power.

In essence, Cross-Respondent is interpreting its agreement so that satisfaction of the prescribed condition to its agreement not to arbitrate – when the

class action ban is deemed unenforceable for some reason — is the same reason the agreement not to arbitrate is not enforceable. *Cf. Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 n.6 (2008) ("It is a peculiar argument, converting agreement as a necessary condition for judicial enforcement into a sufficient condition for a court to bar enforcement."). Such a construction impermissibly renders the agreement not to arbitrate a nullity, and also ignores the legal significance of the fact that Cross-Respondent was well aware that *Muhammad* was applicable when its arbitration agreements took effect in November 2006 and after. In such instances of prior occurrence, the "conditional" agreement not to arbitrate is a "binding covenant," as stated in the New Jersey Supreme Court decision in *Duff v. Trenton Beverage Co.*, 4 N.J. 595, 605 (N.J. 1950):

> There is a fundamental distinction between a condition and a covenant. A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens, or to the case where it does not happen. By its very nature, a conditional promise becomes absolute only upon performance of the prescribed condition. Both futurity and uncertainty are ordinarily the elements of a condition of this class. *If to the knowledge of the parties, the event has either already happened or cannot possibly happen, the promise is either absolute or nugatory from the outset.* And this is true whether the parties are aware of the facts or not. Williston on Contracts (Rev.ed.) sec. 663. (Emphasis added).

"The FAA was enacted to ensure that arbitration agreements are enforced according to their terms[.]" Petition at 34. Cross-Respondent is not entitled to demand arbitration in this case, "because the parties' agreement d[oes] not require arbitration to proceed in this situation." *Volt*, 498 U.S. at 475. This Court can ensure that the FAA's central purpose is effectuated.

CONCLUSION

For the foregoing reasons, the Court should grant the conditional cross-petition for a writ of certiorari if it grants the petition.

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